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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

JOSEPHINE HANNER,
Petitioner,

vs.

CECIL DEMARCUS,
Respondent.

No. 497

PETITION FOR REHEARING

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PETITION FOR REHEARING

COMES NOW THE Petitioner herein by and through her counsel, and pursuant to Rule 58 of the Rules of this Court, moves this Court for hehearing of the decision made and entered by this Court on April 29, 1968.

GROUNDS FOR REHEARING

A. THE DECISION HAS CREATED TWO CLASSES OF JUDGMENT DEBTORS WITH THE DIFFERING SUBSTANTIAL RIGHTS WHEREIN NO SUCH DISCRIMINATION IS AUTHORIZED BY STATUTE OR PRIOR CASE LAW.

It appears that there are now two different classes of judgment debtors in Arizona. One is the ordinary judgement debtor who has all the statutory protections against secret executions set forth in Arizona law and upheld in *Blasingame v. Wallace,* 32 Ariz. 580, 261 Pac. 42; the other is a debtor whose judgment is in favor of a special master. This unfortunate stands naked to the possibility of loss of everything he or she owns, no matter how excessive its value in relation to the judgment, and without possibility of redress.

Blasingame, supra. stands as solid precedent with no hint that it might have been overruled by either the Arizona Court or this Court. *Knight v. DeMarcus,* 102 Ariz. 105, 425 P.2d 837, from which this petition is taken, stands for the proposition that notice of the fact that a judgment has been entered for which execution may issue in the case of a special master's fee, obviates all other requirements relating to execution sales; relieves the sheriff and creditor from their onus, and withdraws from the debtor the shield of the law available to all other judgment debtors.

There is not a jot or tittle in the statutes to justify this conclusion, there is not a dram of logic to support it; and while we must admit that law and logic are not always inseparable, there has been no case precedent cited to or by the Court to justify

this discrimination. A special class has been created for the somewhat dubious benefit of Mrs. Hanner. Procrustes would be charmed.

B. STRAINED TECHNICALITIES SHOULD NOT DECIDE CONSTITUTIONAL ISSUES.

Counsel stated in argument that perhaps only Charles Dickens could have properly portrayed the history of this case. We are now beginning to believe that the talents of Franz Kafka would be more appropriate. We do not know, nor can anyone reading the case and its history, surmise, what issues were presented, resolved, distinguished or simply ignored. We can only guess that in all probability the majority of this Court held that the federal question was not properly presented in the Arizona Courts.

The dissenting opinion on the record of the case clearly points out the fact that the issue of improper execution *was* raised in the Superior Court and in the Supreme Court by the Petition for Rehearing. Even apart from the Petition for Rehearing, allegations concerning this lack of notice of execution were set forth in the briefs filed by Mrs. Hanner in the Supreme Court of Arizona. (Pages 4, 7, 8, 15, 16, 22, 23) While the argument in the Arizona Supreme Court up to the time of rehearing may not have been as pointed and direct as the argument was in this Court, the position was stated, the argument was there, and the record containing the complaints of Mrs. Hanner was before the Arizona Supreme Court.

Mrs. Hanner has not only been isolated as a newly created special type of judgment creditor, she has apparently also been isolated as a different type of petitioner for certiorari. As the dissenting opinion clearly pointed out, technicalities respecting briefing and pleading should not defeat consideration of a constitional question. *NAACP v. Alabama,* 377 U.S. 288; *Wright v. Georgia,* 373 U.S. 284; *Staub v. City of Baxley,* 355 U.S. 313, 318. Mrs. Hanner indeed would have some cause to ask why some petitioners who have not perfectly plead their case in the

lower courts, still receive a hearing in this Court, while she does not.

The matter becomes even more Orwellian when it is considered that the issue of improper execution was not only raised in the Supreme Court in the Motion for Rehearing, but was in the record from the lower court. This was not a case of failing to raise the issue *at all* until the Motion for Rehearing, which is all that the decided cases of this Court have previously held. Mrs. Hanner has thus been made the victim of yet a third discrimination not found in prior case law or statute.

C. THE RECORD BEFORE THE COURT CLEARLY CONTAINS PETITIONER'S POSITION.

The dissenting opinion noted somewhat accurately that the record before the Court printed for review was somewhat scanty. However, as was noted by both the dissenting opinion and the reply brief filed herein, there was no objection raised to the Petition for Certiorari on the grounds that the federal question had not been properly preserved. Under the Rules of the Court, the record is printed after certiorari is granted, and after the entire record had been vertified to this Court by the Supreme Court of Arizona. This complete record contains the abstract of record of the appeal before the Arizona Supreme Court and the briefs. Since no issue had been taken in the response to certiorari concerning the preservation of the federal question, it was not belived to be necessary that matters supporting the preservation of the federal issue be included in the printed record. The petitioner herein might well question the propriety of allowing the respondent to raise the issue of preservation of the question in this answering brief after failing to raise it in the response to certiorari, thus inducing a less complete record. While petitioner does not believe or mean to infer that there was anything intentional in this, if technicalities are to rule the day, petitioner should be able to claim advantage of one of them. In any event, Rule 36 (2) states in part:

"In designating the parts of the record for inclusion in the appendix, the parties shall have regard for the fact that the entire record is always available to the Court for reference and examination, and shall not engage in unnecessary designation."

We believe no sensible person would believe that the designation of lengthy briefs would be necessary for inclusion in the appendix where no issue was raised as to the preservation of the federal question, and where presumably the Court in granting certiorari had reviewed the entire record to initially determine this question. This fact was pointed out in the reply briefs of the appellant herein (Page 2). Are we to believe that this rule exists not in complete form, but with the silent clause "unless the petitioner happens to be named Josephine Hanner" appended to this sentence in the rules?

D. THE ADMISSIONS OF THE RESPONDENT SHOULD BE SUFFICIENT GROUNDS STANDING ALONE FOR REVERSAL.

The respondent herein has been frank enough to admit in both his pleadings and argument before this Court that he was relying exclusively upon a technical objection arising from his interpretation of the thrust of the argument before the Arizona Supreme Court. Respondent's counsel frankly admitted that due process had not been observed, and that Mrs. Hanner was entitled to notice of the actual execution procedures. We find it impossible to explain how a person can be upheld in an execution sale of property four times the value of the judgment after they have admitted that the execution procedures were unconstitutional and denied the debtor due process. This is particularly true when the alleged technical error certainly did not deprive the respondent herein of any remedies he might have had, nor did it prejudice his position in either the Arizona Supreme Court or in this Court. The concept that fair play and substantial due process are of controlling weight in our courts has taken a thorough drubbing.

CONCLUSION

The petitioner herein has been deprived of a substantial right and denied substantial statutory and judicially established protections. She has thus been injured through an extremely rigid interpretation of a highly technical rule which has been either waived or ignored in numerous other cases for numerous other parties before this Court. We can hardly hope to be more clear, explicit or forceful than the dissenting opinion of Mr. Justice Douglas filed herein. An overstrained excessively technical interpretation of a minor procdural rule, resulting in no prejudice to the respondent, and not supported by statutory or case law precedent has been used to deprive Mrs. Hanner of property and to do her an admittedly substantial wrong by an admitted abuse of substantial due process. Petitioner deserves better treatment, and all notions of equity and fair dealing would support the granting of a rehearing in this matter.

Respectfully submitted,

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